IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 126 of 2007
In
SPECIAL CIVIL APPLICATION No. 5747 of 1990
With
CIVIL APPLICATION No. 1603 of 2007
In
LETTERS PATENT APPEAL No. 126 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHOLANATH KALICHARAN CHAUBE - Appellant(s)
Versus
DISTRICT SUPDT OF POLICE & 1 - Respondent(s)

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Appearance :
MS MO NARSINGHANI for Appellant(s) : 1,
NOTICE SERVED for Respondent(s) : 1,
MS REETA CHANDARANA, AGP for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH

and

HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 21/03/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

Rule. Learned AGP Ms. Reeta Chandarana waives service of notice of rule on behalf of respondents.

2. In this appeal, the appellant original petitioner has challenged a judgement and order dated 12th January, 2007 passed by the Learned Single Judge of this Court in Special Civil Application No.5747/1990.

3. Short facts leading to the appeal are that the appellant original petitioner was serving as an Unarmed Head Constable. On account of certain alleged misconduct, a departmental inquiry was conducted against him. Ultimately, the Disciplinary Authority imposed a punishment of compulsory retiring the appellant petitioner by an order dated 16th September, 1978. The appellant challenged the said order of penalty by filing a regular Civil Suit No.154/1978. It appears that initially the Civil Court had stayed implementation of the order of compulsory retirement. Eventually, however, the said Civil Suit came to be dismissed by the Civil Court by a judgement dated 29th August, 1983. The appeal

preferred by the appellant against the said decision also came to be dismissed on 30th October, 1985.

4. It further appears that the appellant petitioner was found involved in Criminal offences punishable under Section 331, 504 and 506 of Indian Penal Code. In connection with the said criminal offence, the appellant petitioner was arrested. He was therefore, placed under suspension. Eventually, the appellant petitioner was convicted by the criminal Court by judgement dated 17th January, 1981 and sentenced to imprisonment for a period of three years. The appellant preferred an appeal against the order of conviction and he was acquitted by the Appellate Court by decision dated 28th June, 1990.

5. In Special Civil Application No.5747/1990, the appellant petitioner challenged initially his order of suspension. Subsequently, he also amended the petition challenging the order of compulsory retirement as well.

6. It appears that the State Government passed an order dated 27th September, 1990 ordering compulsory retirement of the appellant petitioner with effect from 18th September, 1978.

7. Before the Learned Single Judge it was pointed

out on behalf of the respondents that the appellant petitioner himself had written a letter dated 2nd November, 1987 stating that he accepts the order of compulsory retirement.

8. Learned Single Judge by the impugned judgement not only dismissed the petition, imposed a cost of Rs.5,000/- on the petitioner. The Learned Single Judge was of the opinion that the petitioner had attempted to mislead the Court since the date of order of compulsory retirement is mentioned as 16th September, 1990 giving an impression that the petitioner has retired compulsory from that date. Learned Judge was of the opinion that only from the perusal of the original files produced by learned AGP, it could be ascertained that the correct date of compulsory retirement of the petitioner is 16th September, 1978. Primarily, on this ground the learned Judge was inclined to impose cost on the petitioner.

9. It may also be noted that by an interim order dated 29th March, 1993, Learned Single Judge of this Court directed that the pension of the petitioner if not fixed shall be fixed and necessary action of payment shall also be taken. It is not in dispute that pursuant to the said interim directions, the petitioner has been receiving pension from the respondents on the basis of his retirement from service with effect

from 16th September, 1978.

10. Learned advocate Ms. Narsinghani appearing for the appellant petitioner submitted that there was no intention on part of the appellant petitioner to mislead the Court. The appellant petitioner was earlier ordered to be placed under compulsory retirement by order dated 16th September, 1978. However, the said order was stayed by the Civil Court and though Civil Suit came to be dismissed in the year 1983, the State Authorities revived the order of compulsory retirement only subsequently by order dated 27th September, 1990 and placed the appellant petitioner under compulsory retirement with effect from 16th September, 1978. She submitted that at no stage the appellant petitioner had made any attempt to mislead the Court as all dates and events were on record before the Court, nor did the appellant petitioner receive any undue advantage from any miscommunication even if there was inadvertently created. She further submitted that after placing the appellant petitioner under suspension, upon his conviction by the criminal Court, respondents paid only the token suspension allowance of Rs. 1/- per month relying on an obsolete rule of BCSR which came to be struck down by Hon'ble Supreme Court in the judgement in the case of **State of Maharashtra v. Chadrabhan** reported in AIR 1983 Supreme Court 803. She submitted that

the appellant petitioner however, would be satisfied if in addition to setting aside the directions for payment of cost, pension being paid to the petitioner is protected.

11. On the other hand, learned AGP Ms. Chandarana appearing for the State Authorities resisted the Letters Patent Appeal. She submitted that the appellant petitioner himself had in writing accepted the order of compulsory retirement. He thereafter, cannot make grievance and challenge the same order.

12. Having heard the learned advocates appearing for the parties, we find that the explanation rendered by the appellant petitioner regarding the confusion of his actual date of retirement needs to be accepted. As noted earlier, though the appellant petitioner was compulsory retired by order dated 16th September, 1978, the order could not be implemented on account of interim protection granted to the appellant petitioner by the Civil Court. Subsequently, by order dated 27th September, 1990 the authorities revived the order of compulsory retirement and treated the appellant petitioner to have compulsory retired with effect from 16th September, 1978. In that view of the matter, we find that the order for payment of cost needs to be deleted.

13. The question of continuation of pension to the

appellant petitioner however, survives. It is not in dispute that the appellant petitioner has been receiving pension on the basis of his service rendered in the State Government upto 16th September, 1978. It is not even the case of the respondents that the appellant petitioner is not entitled to receive such pension. In that view of the matter despite our upholding the view of the Learned Single Judge that once having agreed not to challenge the order of compulsory retirement, it was not open for the petitioner to maintain the petition, the pension that the petitioner has been receiving during the pendency of the petition should not be disturbed. It is true that the petitioner started receiving such pension only after this Court passed the interim direction on 29th March, 1993. However, in facts of the case, we find that the appellant petitioner having rendered service in the State Government right upto 16th September, 1978 and under the protection of Civil Court for sometime thereafter also, it would not be open for the respondents to withdraw or to vary to his disadvantage the pension which the appellant petitioner is receiving.

14. In view of the above observations, this Letters Patent Appeal is disposed of by giving following directions :

1) The order for payment of cost of Rs. 5,000/- imposed by the Learned Single Judge is set aside.

2) Though the order for dismissal of the petition is not disturbed, it would not be open for the respondents to discontinue or vary to the disadvantage of the appellant petitioner the pension which he was receiving during the pendency of the petition and which he is receiving even presently.

15. With above directions, Letters Patent Appeal is disposed of by allowing in part.

16. Since Letters Patent Appeal is disposed of, Civil Application does not survive, same is disposed of accordingly.

(M.S.Shah,J.)

(Akil Kureshi,J.)

(raghu)